Supreme Court of the United States

OCTOBER TERM, 1951.

No. 674.

TWENTIETH CENTURY-FOX FILM CORPORATION ET AL., PETITIONERS,

VS.

BROOKSIDE THEATRE CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

STATEMENT.

No conflict of decision with another circuit is claimed; nor is it claimed that any important, new or novel question of law, federal or otherwise, is involved. A neutral source, the Court of Appeals (Vol. IX, pp. 23, 24), describes the case as follows:

> "The case was * * * not a pioneer but had many predecessors involving substantially the same issues. It contained no novel questions * * * prior cases in the same field had charted the course and procedure to be followed."

Petitioners' attempt to obtain "another hearing" by use of the writ might be laid to the zeal of counsel but the method by which they seek to invoke attention of this court cannot be overlooked. We refer to serious misstatements of the record in certain particulars.

Before answering each contention now urged and calling attention to misstatements deemed important, we summarize briefly the case alleged and proved.

Petitioners, in carrying out the objects and purposes of their conspiracy described in *United States* v. *Paramount*,[1] drove respondent out of business in 1936-1937 by forcing respondent to turn over to a subsidiary of one of them (Fox) respondent's Brookside Theatre in Kansas City, Missouri.

Respondent, by appropriate contracts early in 1936, arranged for the building of this new and strategically located theatre seating a minimum of 1100 persons, beautifully designed by theatre architects, elaborately furnished and equipped and acquired a 15-year lease on the theatre (R. 427-430).

All petitioners (commencing in July, 1936) refused (R. 458-486) to negotiate with respondent for feature pictures, asserting that they had granted the Fox Waldo Theatre

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[1] *U. S.* v. *Paramount*, 334 U. S. 131, 68 S. Ct. 915, affirming in part and reversing in part 66 F. Supp. 323. The proceedings after remand are reported in *U. S.* v. *Paramount*, 85 F. Supp. 881, affirmed in 339 U. S. 974, 70 S. Ct. 1032, rehearing denied 71 S. Ct. 70.

(nearest Fox theatre to the Brookside Theatre but 20 blocks to the south) an exclusive run and that they could not serve respondent at all on any terms at any price, without consent of the Fox subsidiary, which consent was refused (R. 1356, 2396). Original opening date of the Brookside scheduled for December 24, 1936, was moved up to March 1, 1937 (R. 524, 525). By that date some of petitioners agreed to furnish pictures but *only upon condition* that the Brookside maintain an admission price of 25 cents and play the pictures after they had been played at the Fox Waldo which maintained an admission price of 20 cents (R. 489-90, 492, 508, 511, 526-29) (See Plaintiff's Exs. 66, 68, 73, 100, Vol. VIII, Supp. R. 7-9, 15, 17-19). Fox, Warner Bros. and RKO, without whose pictures a subsequent run theatre cannot successfully operate (R. 1294, 1295), continued their unqualified refusal to furnish any product (R. 531).

From March 1, 1937, to November 20, 1937, respondent operated the Brookside with the limited product available on the condition imposed which also meant (under the operation of the uniform zoning and clearance schedule maintained by petitioners in Kansas City, Missouri) that the Brookside charging 25 cents as required had to *play* after every 20 cent house in Kansas City and even after some 15 cent houses but *pay* a film rental greatly in excess of that paid by Fox Waldo or any other 20 cent house (see Plaintiff's Ex. 132, Vol. VIII, Supp. R. 33-121). To increase pressure on respondent, Fox Waldo adopted a late dating and booking policy coupled with frequent cancellations so that it was virtually impossible for respondent to know what pictures would be available or when they would be available even of those petitioners willing to furnish same conditionally (R. 506, 512, 552, 553, 554 and see Plaintiff's Exs. 5, 158, 159, 160, 161, Vol. VIII,

Supp. R. 144-47). To keep the doors open, respondent was compelled to run pictures of such small producers as Grand National, Majestic and Republic and to play other inferior, re-issue or rejected pictures not played by Fox Waldo (R. 506, 507, 512, 538, 549, 953).

Having exhausted all possibilities in Kansas City to obtain relief, respondent in the fall of 1937 made a personal plea to Spyros Skouras, head of all Fox theatre operations in the United States, to give the consent that would allow respondent to receive an adequate and normal supply of feature pictures (R. 623, 1361). Skouras flatly refused, declaring that Kansas City was a "Fox town," especially the south side of Kansas City, and "we expect to keep it as such. You had no business coming in there" (R. 1362). Skouras advised respondent to transfer the theatre to Fox, saying, "we can get the pictures" (R. 1362).

Having no other alternative but to close the theatre (R. 657-658) respondent finally capitulated and on November 20, 1937, after a second ultimatum by Elmer Rhoden, head of all Fox theatre operations in Kansas City (R. 663, 664, 1367) transferred its 15-year lease, business and property constituting the Brookside Theatre to Fox at the inventory value of the furnishings and equipment, *which value was fixed by Fox without negotiation* (R. 668, 1369). Before taking this step, respondent in October, 1937, wrote the Department of Justice complaining of the situation (R. 626, 627, 649-53, 655, 656, 1363, 1364) (See Plaintiff's Exs. 106 and 107, Vol. VIII, Supp. R. 23, 24, 28, 29). In the contract of transfer (drafted by the Fox attorney, who had been made aware of respondent's complaint to the Department of Justice (R. 661, 662, 2489)), there was included a "silencing provision" precluding respondent from making any further complaints or communications to *any*

one, the language being so broad as to necessarily include the Department of Justice (See Plaintiff's Ex. 110, R. 2952, 2959, 2960).

As soon as Fox got possession of the Brookside Theatre all petitioners (including Fox, Warner Bros. and RKO) immediately made available and continue to make available to the present time all of their feature pictures for exhibition in the Brookside on the third suburban run, which is a run not after the Waldo but *five weeks ahead of the Waldo, one of the preferred suburban runs in Kansas City* (R. 366, 675, 1178, 1373, 1543, 1639, 1664, 1796, 1824, 1911, 1948 and 2406).

Under an appropriate order of discovery respondent was allowed to audit the Fox books which revealed that to August 18, 1950 (the date the audit was terminated because of imminence of trial) the Brookside Theatre had earned net profits of $317,078.02 before depreciation (Plaintiff's Ex. 113, R. 2967). Projecting Fox experience during the first year of Fox ownership back during the time respondent operated and projecting the last year of Fox operation forward to the end of the lease, February 29, 1952 (Plaintiff's Exs. 116, 115, 114, R. 2985-87) reveals that the Brookside Theatre had an earning capacity during the fifteen years of the lease of $392,258.66 *operating only on the third suburban run.*

But the evidence further disclosed that after Fox got possession of the Brookside it did not operate on the same run as an independent exhibitor (unrestrained by the conspiracy) would have done but fitted the Brookside into the Fox hierarchy of theatres on the south side of Kansas City so as not to compete with its Plaza, Isis or Apollo Theatres which operated on the second and third city runs (R. 851-53). Respondent's evidence was that, if an independent

exhibitor had had access to the product, he would have operated the Brookside on the first or second suburban run, which would have doubled or trebled the profits earned by Fox (R. 1374, 1375, 611, 850-56). Respondent's evidence also was that the market value of the Brookside in November, 1937, as distinguished from earnings or profits, free from conspiracy, was at least $300,000 (R. 850, 851).

Respondent, in its complaint, charged the same conspiracy and monopoly in interstate trade and commerce and the same unlawful contracts and business practices as in *United States* v. *Paramount, supra.* The Government's anti-trust suit was filed July 20, 1938—seven months after Fox got possession of the Brookside. The Government in its bill of particulars in the Paramount case listed the Brookside as one of many examples of how independent exhibitors had been driven out of business and forced to turn over their property and business to one of these conspirators (See Plaintiff's Ex. 2, Vol. VIII, Supp. R. 3).

After the results of the Paramount case were assured, this suit was filed. In a seven weeks' trial, commencing November 13, 1950, before a court and jury petitioners were overwhelmed with evidence of their violations of the Sherman Anti-Trust Act to such an extent that the trial judge, in denying petitioners a new trial, declared upon the record "the evidence in the case justified a verdict for plaintiff," and further declared "it is my opinion" that petitioners' "own testimony and exhibits" justified a verdict for respondent (R. 2761-2). The Court of Appeals described petitioners' conduct as "bold, relentless and predatory commercial behavior" (Vol. IX, R. 23). The jury returned a verdict of $375,000.

PARAMOUNT CASE.

A.

The trial court correctly and carefully declared to the jury, insofar as relevant to the case on trial, what was determined in the Paramount case and its significance as prima facie evidence.

Petitioners' assertion, that the trial court left "the determination of the *prima facie* estoppel to the jury rather than informing them of the facts which constituted the estoppel" (p. 11, Petition) in violation of the rule of *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 71 S. Ct. 408, is an unwarranted misstatement of the record. *It is simply not true.* Petitioners do not point to *any place* in the record where the trial court by any language, expressly or impliedly, allowed or permitted the jury to determine for itself the scope of the estoppel created by the Paramount case. They cannot do so. Nothing like that occurred. *The Court of Appeals did not so find.* It could not "erroneously sanction" something that did not occur.

The trial court in meticulous fashion complied with the Emich case. Witness these facts:

The primary record of the Paramount case consisting of the Government's petition, bill of particulars, amended petition, findings of fact and conclusions of law, and final judgments and decrees (except the final decrees against Paramount and RKO, they being by consent) were offered and received in evidence. *None of these was read* to the *jury except* portions of the final decrees (R. 235-39) which incorporated by express reference (R. 236) the findings of fact and conclusions of law. Only such findings of fact (R. 220-34) and findings of fact contained in the conclusions of law (R. 239-48) *were permitted to be*

read to the jury as directly related to the charges contained in respondent's complaint.

When the court came to his charge, he informed the jury that the Paramount case was instituted in the Southern District of New York in July, 1938, by the United States Government against all of petitioners and others, charging certain violations of the Sherman Anti-Trust Act. He informed the jury that a final judgment was entered against six petitioners on February 8, 1950, but that same did not affect RKO and Paramount (R. 2606, 2607). As to those two petitioners, the court charged that, if they were guilty of any of the acts complained of by respondent, such finding must be based on facts outside of the Paramount case (R. 2610).

The court explained to the jury that under the Clayton Act the decree in the Paramount case is *prima facie* evidence (which term he carefully explained) as to facts as to which petitioners against whom the decree was received had been found guilty (R. 2607).

The court then proceeded in separately numbered paragraphs in his charge and in carefully chosen language to *summarize those findings of fact relevant to the case on trial* (R. 2607-2609). The appellate court found (Vol. IX, R. 13) and this court will observe that the trial court in giving the summary confined it to ultimate facts and made no reference to evidentiary facts.

Then the court charged the jury that the ultimate facts which he thus summarized as being determined in the Paramount case did not of themselves establish any fact as to the activities of petitioners in Kansas City, Missouri,[2]

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[2]In this particular the trial judge recognized at the hearing on the motion for new trial that he had unintentionally probably

but that they covered a nationwide situation concerning which the Government complained (R. 2609).

Continuing, the court charged that for respondent to recover, it must establish by other evidence that some violation of the law which occurred generally throughout the country as determined in the Paramount case "was also specifically practiced in Kansas City, and that as a result thereof, the plaintiff was injured in its business or property" (R. 2609). The court charged that, if the matters and things which he thus summarized as having been established by the Paramount case had been proved by respondent to have occurred with respect to its Brookside Theatre, then the jury would have the right (under the *prima facie* rule) to find that they occurred pursuant to the conspiracy and illegal acts thus established by the Paramount case. But he further declared (R. 2609):

> "You cannot find a verdict in favor of the plaintiff simply because these defendants have been unsuccessful litigants in their suit with the Government in New York."

The Court of Appeals found that the trial court did not leave the scope of the estoppel of the Paramount case for determination by the jury (Vol. IX, R. 13):

We invite the court to examine the record (R. 2607-2609), and observe for itself with what care the trial court summarized *only* the ultimate facts determined in the Paramount case (relevant to the case on trial) and defined the scope of the *prima facie* estoppel created by the Paramount case and left nothing for the jury to de-

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deprived respondent of the full measure of benefit of the Paramount case (R. 2761).

termine as to what was or was not decided by the Paramount case and the significance thereof.[2]

B.

There was no error in allowing counsel to correctly refer to the Paramount case, either in opening statements or in closing arguments; nor any error in allowing counsel to read to the jury carefully selected findings of fact from the Paramount case as part of the explanation of the prior Government anti-trust action.

Concerning the manner in which the explanation of the antecedent litigation is to be made to the jury, this court in the Emich case flatly refused to pronounce any hard and fast rules, recognizing that the trial courts must be free to exercise sound judicial discretion in a particular case. This court said:

> "*As to the manner* in which such explanation should be made, *no mechanical rule can be laid down* to control the trial judge who must take into account the circumstances of each case. *He must be free to exercise a 'well established range of judicial discretion'*" (Italics ours).

No point is raised by petitioners as to the propriety or correctness of receiving in evidence the primary record in the Paramount case. No point is raised as to the truth or accuracy of any "references to the Paramount case" made by court or counsel. Petitioners merely assert (p. 10, Petition) that there was error "*in the manner* in which the trial court permitted" these correct refer-

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[2]At the trial petitioners deemed the charge legally correct for the only exception they took to what the court said in its charge about the Paramount case was to the use of the word "guilty" (R. 2659, 2660).

ences to admissible evidence to be made and urge also that it was error for the trial court to allow counsel in opening statement and closing arguments to refer to this same evidence.

Petitioners contend that only the trial judge can say a single word about the antecedent case. If respondent's counsel refers to the fact that there was such a case in his opening statement or refers to the facts he expects to establish *prima facie* by such antecedent suit or urges in closing argument that the jury should find as a fact what has been *prima facie* proved, this constitutes a "radical" departure from the Emich case. We respectfully suggest that counsel have not read the Emich case with understanding.

The Emich case, in addition to declaring that no mechanical rules exist to control the trial judge in a particular case and that he is free to exercise a well-established range of judicial discretion, in unfolding to the jury the fact and meaning of the antecedent litigation, further declares that the trial judge may resort to such portions of the record in the antecedent case as he may find

> *"necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial."*

"Present" means to exhibit or offer to view or notice; to submit for consideration; to put before a person, or introduce. To adequately and appropriately reconstruct and unfold before the jury the antecedent case so that it may know and understand what was decided and apply it correctly to the case on trial, the trial court must necessarily explain the antecedent case by narrating the same or by reading selected portions or both. Where the former

case contains specific findings of fact and conclusions of law it will often be desirable to use the exact language. If portions of the prior case are to be read it is not required that the judge only shall enunciate the words but they may be read by counsel or by the Clerk in accordance with the usual course of procedure in our courts of law.

Consequently, there was no error in allowing counsel to read relevant findings in the language of the court that made the findings which were later summarized by the court in his charge. The assertion by petitioners that there was an indiscriminate reading of findings is not sustained by the record. The Court of Appeals declared (Vol. IX, R. 6) that there were read to the jury only "such portions of the findings of fact and conclusions of law as had direct relation to the charge contained in plaintiff's complaint." Moreover, some findings were read at the express request of petitioners (R. 228).

Still pursuing their untenable position, petitioners complain that counsel were permitted to refer briefly to the history of the Paramount case in the opening statements and to indicate to the jury what facts respondent would seek to establish *prima facie* by the Paramount case. No case is cited and none exists, we submit, which closes the lips of counsel to revealing to the jury *prima facie* facts (resulting from former litigation) any more than revealing to the jury other facts expected to be proved. They must all be resolved by the jury. Since the Paramount case only establishes *prima facie* (for a private litigant) certain facts, they are not conclusive and, therefore, the jury has as much right to know about them from the beginning of the trial so as to evaluate them against all of the other evidence, and so as to evaluate the other evidence

against them, as it has the right to know of other facts expected to be proved. Petitioners never conceded liability at the trial; throughout they constantly asserted their innocence; they sought by evidence and by arguments to the jury which the Court of Appeals has characterized as "vitriolic and denunciatory" and as "extravagant and reprehensible" (Vol. IX, R. 23) to prove that they were not liable. They defended on every ground, including denial of any conspiracy, monopoly or unlawful activities —even laches (!).

Neither is there any error in letting the jury know that the Paramount litigation continued for more than ten years. Petitioners throughout the trial upon the slightest pretext constantly kept before the jury as a pretended defense that respondent had waited from 1937 to 1949 to bring this suit and that it had been dreamed up years after the event. It was important for the jury to know that the results in the Paramount case under the provision of the Clayton Act, the object and purpose of which was to give to private litigants the benefit of the results of the Government suit, were not available during the more than ten years the Government litigation was pending. This court has declared that the objects and purposes of the anti-trust laws are "clearly legitimate subjects for discussion before the jury." *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811, 852.

References to petitioners in closing argument as monopolists and as having been found guilty of violations of the anti-trust laws were clearly proper. Such was the evidence before the jury. The charge was violation of the anti-trust laws of the United States. Respondent introduced evidence, original and *prima facie*, to prove the charge. It had the right to discuss the evidence fully,

freely and frankly with the jury. It had the right to invite and to argue to the jury that it should find as a fact that these petitioners were monopolists, conspirators and violators of the law. Respondent had to prove this before it could recover.

The Emich case declares that, in order to make a submissible case, it is necessary for respondent "only to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them * * * and evidence of any resulting damages." Thus respondent did not need to buttress its case on conspiracy with other facts but, of course, had the right to do so and did.

Suppose, however, it had not done so but had confined itself to the minimum proof approved by this court. If that course had been followed, would anyone suggest that counsel in opening statement could not make appropriate and correct references to the Paramount case so as to give the jury an intelligent understanding of the basis upon which the case was proceeding and the issues they would eventually be called upon to resolve? Or, would anyone suggest that in closing argument counsel could not invite the conclusion, and by all legitimate persuasion, limited only by the evidence and issues, undertake to convince the jury that they ought to conclude, that the damage and injury suffered by respondent was due to the identical conspiracy, monopoly or other unlawful acts established in the Government's anti-trust proceeding? There is nothing in the Emich case circumscribing or limiting the historical right of counsel to make an argument to the jury based upon and within the scope of evidence properly received at the trial. That was all that happened in this case.

Petitioners assert that respondent's counsel was permitted "to present to the jury his interpretation" of the Paramount case and permitted "to give his version" of that case (p. 13, Petition). *This assertion is out of the whole cloth. Petitioners cite this court to no place in the record where any such thing occurred. The record will not sustain the charge made.* The primary record of the Paramount case was introduced in evidence and selected findings of fact read to the jury. No one of counsel on either side presumed to give any version of the Paramount case. The court in its charge declared as a matter of law what had been decided in the Paramount case insofar as relevant to the case on trial.

References to the history of the Paramount case in the opening statement were entirely factual. The Court of Appeals found petitioners' charge to be wholly without substance, saying (Vol. IX, R. 22), "What Mr. Boatright said with reference to this evidence (referring to the Paramount case) was so notorious and well known as to be a matter of history. He referred to no evidence which was not admissible. * * *"

What petitioners seek is a ruling that will keep the triers of the fact completely in the dark concerning the Paramount case until the final charge of the trial court. We submit that such procedure, if followed, would to all intents and purposes nullify the benefits intended to be bestowed by the Act of Congress.

C.

A witness may be impeached by his former testimony and a party's admissions against interest in former litigation may be shown; the fact that such testimony or admissions occurred in the Paramount case does not make them incompetent.

Elmer Rhoden, President of Fox Midwest Theatres, Inc., testified in this case, as he had in the Paramount case, that he had never sought to make agreements with any of the distributors respecting admission prices to be charged by his competitors and that he had never threatened not to play pictures of any of the distributors unless they required independent exhibitors, like respondent, in competition with Fox to maintain certain admission prices and that there could be no business reason impelling him to do so (R. 2423).

He was impeached by his own correspondence with Al Lichtman, then President of United Artists and now Vice President of Fox, wherein Rhoden, speaking for Fox, refused to confirm contracts for exhibition of United Artists' pictures in the Fox theatres until United Artists wired Rhoden that the licensing of United Artists' pictures to independent exhibitors would be "predicated" upon the independents "charging proper admissions." Whereupon, Rhoden wrote United Artists, "Now *we* must agree upon what is the proper admission" for the independents to charge (italics ours) (See Plaintiff's Exs. 163, 164, 165, 166, 167, introduced at R. 2423-28, reproduced in Vol. VIII, Supp. R. 147-167).

The fact that Rhoden had twice given false testimony on the same subject and in the same connection was a proper fact for the jury to know in determining what weight and credibility to give to his testimony. Moreover

no objection was made to reference to Rhoden's similar testimony in the Paramount case (R. 2423).

The other witness, Charles Reagan, Vice President of Loew's, was asked if he had testified on a certain point in the Paramount case. Counsel for petitioners asked the purpose and, when informed it was for impeachment purposes, withdrew his objections (R. 502-514).

Finally, petitioners complain that answers of petitioners to interrogatories propounded to them in the Paramount case were offered and received in evidence. These exhibits were not read to the jury and their introduction in evidence had nothing whatever to do with the *prima facie* case established by the Paramount decrees. The purpose was to obtain factual data not otherwise available to respondent. This factual information was used by the auditors and accountants in preparing certain tabulations and charts which were placed in evidence. These interrogatories constituted admissions against interest.

The circumstance that petitioners' witnesses had made contradictory statements in the Paramount case did not preclude the use of those statements for purpose of impeachment in this case and relevant statements made by petitioners in the Paramount case were not disqualified as admissions against interest in this case.

This court, in the Emich case, said (Footnote 8) as regards to the Government's judgment in the antecedent case,

> "* * * we do not intend to preclude its admission for such other purposes, apart from Section 5, as the general law of evidence may permit."

The Court of Appeals, after considering all of petitioners' contentions with respect to the handling of the

Paramount case, held those contentions to be "wholly without merit" (Vol. IX, R. 13). No one can read this record and the charge and come to any other conclusion.

DAMAGES.

Loss of profits, resulting from tortious destruction or interruption of a business is a proper element for the jury to consider in assessing damages.

Petitioners assert that an "erroneous measure of damages" was adopted which resulted in respondent recovering the profits made by the Fox subsidiary out of the Brookside rather than "the fair market value of its lease at the date of the forced sale" (p. 11, Petition).

Here again petitioners are in part clutching at something the record will not sustain and in part giving a false impression of the charge on the question of damages.

The trial court did not charge that, if the verdict was in favor of respondent, its damages should be assessed at such sum as Fox had made out of the Brookside Theatre. The trial court, in the language of the statute (Section 5 of the Clayton Act, Title 15, U. S. C. A., Sec. 16), charged that, if the verdict was for respondent, the jury should assess the damages at such sum as would fully compensate respondent for the damage done to its business and property as of November 20, 1937 (R. 2620).[4]

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[4]In the trial court's charge the court informed the jury that it had a right to consider that respondent had a 15-year lease; to consider whether or not respondent would have operated the theatre for the full term of the lease except for the conditions concerning which it complained; to consider the sound market value of respondent's business, equipment and leasehold as of November 20, 1937; to consider, if respondent had operated the theatre, whether or not it would have operated on a better run;

On the question of the profits earned by the Fox subsidiary after November 20, 1937, the court charged (R. 2622, 2623):

> "* * * such profits are not necessarily the measure of damages, but simply a circumstance and an element to be taken into consideration."

Consequently, petitioners' statement which is reiterated two or three times in the petition (pp. 6, 7, 8, 14-17) that "the amount of the verdict clearly indicates that the jury considered no other element (than Fox profits) in determining damages," is pure wishful thinking. There is nothing in the record to justify an assertion that the jury disregarded the instructions of the court which were plain and unambiguous.

Lost profits are, of course, a recoverable element of damage where business has been tortiously interrupted or destroyed as the trial court recognized. The cause of action was complete and the damage suffered in legal contemplation on November 20, 1937 (the date petitioners forced respondent to turn over its business), and the trial court, therefore, properly required the jury to fix the damage as of that date. But the trial court was not misled by two red herrings drawn across the path by petitioners. One is petitioners' contention that the only recoverable element of damage was the difference, if any, between the fair market value of respondent's business and property on November

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to consider whether or not, if respondent had operated the theatre, the earnings would have been increased or would have been less; to consider all of the competitive facts that would have come into play, as disclosed by the evidence, if the theatre had been operated on a different run; not to speculate or guess but to fix the damages with reasonable certainty (R. 2620-22, 2625, 2626).

20, 1937, and what Fox Midwest paid for the same. The other is petitioners' contention that evidence of the earnings of the Brookside after November 20, 1937, could not be received to enlighten the jury as to the full extent of the damage suffered by respondent from the tortious loss of its business and property.

The Court of Appeals summarized the situation admirably (Vol. IX, R. 16, 17):

> "The value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants, depended certainly to some extent on its capacity to make profit. * * * If profits that might reasonably be realized from the conduct of a business destroyed by the tortious act of the wrongdoers may not be taken into consideration in ascertaining damages, then the wrongdoer might with impunity destroy a competitor's business and profit by such wrongful act."

Petitioners seek to overturn *Bigelow* v. *RKO Pictures*, 327 U. S. 251, 66 S. Ct. 574, 579, holding that the "fair value" of respondent's "right to continue" its business "depended on its capacity to make profits." They recently made a similar attempt in *Loew's, Inc.*, v. *Milwaukee Towne Corp.*, No. 454, writ denied ..... If petitioners could escape full compensation to their many victims by holding the measure of damages down to "market value" at a given date and excluding from evidence the huge profits they have made from the business and property of their victims, they would be able to retain the "large empires" created by their "predatory practices * * * largely out of the ruins of the small operators," *United States* v. *Paramount*, 334 U. S. 131, 68 S. Ct. 915, 931.

Petitioners assert that *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 51 S. Ct. 248, stands for the propo-

sition that one who wrongfully destroys the business of his competitor can not be liable for more than the market value of the business as of the date of destruction and that the profits that the business might have earned for its owner, had it not been destroyed, may not be considered in fixing the amount of the damage. The *Story Parchment* case stands for no such proposition. In that case this Court cited and quoted with approval from *Allison* v. *Chandler,* 11 Mich. 542, wherein plaintiff, subjected to repeated tortious acts, abandoned his business and sued to recover damages, including lost profits to the end of his lease term, if he had been permitted to conduct his business uninterruptedly. The Michigan court said:

> "* * * This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. *He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum*" (Italics ours).

A similar conclusion was reached in *Chapman* v. *Kirby,* 49 Ill. 211, cited and approved by this court in *Weinman* v. *De Palma,* 232 U. S. 571, 34 S. Ct. 370. In that case plaintiff, being forced out of business by wrongful act, sold his plant, closed his business and sued to recover his damage, claiming, among other elements, loss of profits. The Illinois court said:

> "It cannot be held that, * * * appellee should remain inactive, hold his machinery, unfinished stock and fixtures, until the end of his term, * * *. No rule of law or principle of justice could require such a course. * * * The person thus wronged is entitled to recover, for all of the injury he has sustained. * * * And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants?"

Petitioners complain that the lapse of time enabled respondent to prove by Fox operations the tremendous earning capacity of the Brookside Theatre during what they refer to as the "lush war years." There is no merit in the contention. One of the leading decisions on the point is *People's Ice Co.* v. *Steamer Excelsior*, 44 Mich. 229. The court points out why in some cases, when the trial occurs shortly after the cause of action arises, the law, for want of better evidence, permits "the *probable* extent of the damage suffered" to be shown, but, if sufficient time has intervened, the *"actual result"* may be shown; in both cases the extent of the injury being thus legally established with reasonable certainty. Finally, the case demonstrates why the tort feasor cannot complain because favorable seasons are involved in the "actual result." He is not responsible for the favorable times and since all business looks to favorable times to make their profits and recover back losses suffered during unfavorable seasons, "it is not for the wrongdoer to say they shall not."

Nothing can be added to the illuminating language used by Justice Cardozo, in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 53 S. Ct. 736, l. c. 739:

> "At times the only evidence available may be that supplied by testimony of experts * * *. But a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within."

STATUTE OF LIMITATIONS.

A.

The interlocutory or interim decree of November 20, 1940, did not terminate the pendency of the Paramount case; it was merely an auxiliary enforcement procedure adopted for a limited time and concluded nothing.

Five petitioners contend that *U. S.* v. *Paramount*, *supra*, was not pending as against them from November 20, 1940, to August 7, 1944, and that, therefore, the present action is barred as to them under the three-year statute of limitations. The contention rests upon the assertion that the so-called consent decree of November 20, 1940, was a final decree (p. 11, Petition).

Section 5 of the Clayton Act provides that all statutes of limitations are suspended "*during the pendency*" of the Government's suit. Under elementary principles, the history of every suit is comprehended in three stages: Its institution, its pendency and its determination.

> "When once instituted it is thenceforward pending, in every instant of time, until finally disposed of. As expressed by the Superior Court of New Hampshire, the term 'pending' means nothing more than 'remaining undecided.'"
>
> *Ex parte Munford*, 57 Mo. 603.

In *Berman* v. *United States*, 302 U. S. 211, 212, 213, 58 S. Ct. 164, this Court held that a decree was final "'when it terminates the litigation between the parties on the merits' and 'leaves nothing to be done but to enforce the execution of it.'" And in *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88, 42 S. Ct. 196, this Court said that a final decree was "one that finally adjudicates upon the entire merits, leaving nothing further to be done."

An action is pending so long as the courts either *propose* to consider the matter further on the merits or *may* at the instance of any party consider the matter further on the merits. An action is, therefore, "pending" until finally disposed of.

Petitioners argue that the Government's future use of consent decrees will be seriously hampered under the ruling below. This is another vain grasping at straws. *Nothing like that is involved in this case.* The Court of Appeals has not held that anti-trust litigation may not be finally terminated by consent decrees. Neither has it held that a consent decree which does in fact terminate the litigation is not a final decree. It has merely recognized that the *particular decree* entered in the Paramount case on November 20, 1940, was not intended to and did not in fact terminate the litigation in that case.

The fallacy of petitioners' contention lies in attaching to the words "consent decree" a significance they do not have in and of themselves. Of course, anti-trust litigation brought by the Government, like any other litigation, may be terminated by a consent decree.[3] *Whether a par-*

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[3]The three cases cited by petitioners on page 18 of their petition are no authority for the proposition that the consent decree in the Paramount case was a final decree. In each of those three cases the decree entered by consent was labelled "Final" and was referred to in the body of the decree as "final." That was not so in the consent decree in the Paramount case; the word "final" no where appears in it. In each of the decrees in the cases petitioners cite, the consenting defendants were *forever* bound. But Paragraph XXIII (c) of the consent decree in the Paramount case was expressly included for the purpose of enabling any consenting defendant to apply at any time more than three years after entry to vacate the decree without the necessity of showing new or changed conditions.

ticular consent decree terminates litigation so that it is no longer pending depends upon the character and effect of the decree, not whether it was by consent or otherwise. An interlocutory or interim decree may be by consent and still fall very short of terminating the litigation. It may even have many attributes of a final decree, may employ similar language, may be far-reaching in scope, may even furnish the pattern of the final decree, but if it does not in and of itself finally dispose of the litigation and conclude the issues tendered, it is no final decree, no matter by what name it is called and the action still pends.

Did the decree of November 20, 1940, finally dispose of the Paramount case? The court that rendered the decree says it did not. In *U. S.* v. *Paramount*, 66 F. Supp. 323, it said (l. c. 333):

> "*Counsel for the five major defendants* and their subsidiaries *contend that the consent decree has, in some respects, at least, the effect of a final judgment* which may not be modified. But *we cannot see how such a position is consistent with the language of Section XXIII*(d), *which permits* '• • • *any of the parties to this decree to apply* to the court at any time more than three years after the date of the entry of the decree *for any modification thereof.*' That period has expired, and therefore everything relating to rights under and remedies for violation of the Sher-

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This provision is not to be found in nor is any right similar to or approximating it granted to the consenting defendants by the decrees in the three cases cited by petitioners. The only modification that can be made with respect to final decrees are modifications required by changed conditions which make further operation of the decree as cast unjust and inequitable. No court enters a final decree allowing the parties against whom the decree runs the right to have it vacated, regardless of changed conditions. See the pertinent language of Mr. Justice Cardozo in *U. S.* v. *Swift & Co. et al.*, 286 U. S. 106, 52 S. Ct. 460, 462.

man Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties" (Italics ours).

Petitioners in their appeal to this court from that decision made the same contention. This court held the contention not good.

> "The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action." Footnote 3, 334 U. S. 131, 68 S. Ct. 915, 921.

The Court of Appeals, after considering the contention said (Vol. IX, R. 21, 22):

> "We think it clear that the consent decree entered in the Paramount case was not in reality a final decree. It certainly did not terminate the litigation and it was not intended as a final decree terminating the litigation."

The same Court of Appeals, in an earlier case involving these petitioners and this same decree, said:

> "* * * the consent decree was obviously merely 'an auxiliary enforcement procedure' which the court authorized to be used during the *pendency* of the action * * *" (Italics ours).
>
> *St. Louis Amusement Co.* v. *Paramount et al.*, 168 F. 2d 998, 990 (C. C. A. 8).

The trial court in the instant case ruled (R. 127):

> "After very carefully reviewing the briefs submitted * * * and listening with great interest and attention to the splendid arguments of counsel for the respective parties, I have come to the conclusion that the case of *United States* v. *Paramount Pictures, Inc., et al.* * * * was pending within the meaning of Section 16 of Title 15, U. S. C. A. * * * so as to suspend the

running of the statute of limitations against the filing of the present suit."

The District Court in Utah in *Christensen* v. *Paramount Pictures*, 95 F. Supp. 446, 453, 454, rejected the same contentions made by these petitioners:

> "Even against consenting parties the government's complaint, alleging monopoly, and seeking remedies of divorcement and divestiture, was still pending because the consent decree by its own terms excluded these.
>
> This consent decree involved no adjudication, no merger and was not *res adjudicata* as to any issue raised in the complaint."

The Utah court also called attention to the fact that the statutory court expressly declared in the *final decree of February 8, 1950*, that petitioners had violated the Sherman Anti-Trust Act, "both before and after the entry of said consent decree" and, concluded that (l. c. 453):

> "Assuredly, this is unusual, if the consent decree is to be regarded as an adjudication of anything."

The Court of Appeals did not, as petitioners state (p. 11, Petition), hold that the consent decree was not final because it contained a three-year trial period and was subsequently modified. The Court of Appeals held it was not final because it "did not terminate the litigation."

B.

Neither court below had any occasion to consider and did not consider whether the Wartime Suspension Act applies to private parties under the anti-trust laws.

Petitioners concede that neither of the courts below undertook to interpret or apply the Wartime Suspension Act.

When the courts below reached the conclusion that the Paramount case was pending until the motions for rehearing on petitioners' second appeal were overruled by this court, there was no occasion to go further.

Six district courts and one Court of Appeals *unanimously* agree that the Wartime Suspension Act of October 10, 1942, applies to civil proceedings by private litigants as well as civil proceedings by the Government. *No reported case holds to the contrary.* The cases are as follows:

Tiffin Building Corp. v. *Balaban & Katz Corp.*, 87 F. Supp 121 (D. C. N. D., Ill., 1949) (Judge LaBuy).

United West Coast Theatres Corp. v. *South Side Theatres,* 86 F. Supp. 109 (D. C. S. D., Cal., 1949) (Judge Mathes).

Fifth and Walnut, Inc., et al. v. *Loew's, Inc., et al.*, 76 F. Supp. 64, 68 (D. C. S. D. N. Y., 1948) (Judge Ryan).

Theatre Investment Co. v. *RKO,* (D. C. E. D., Wash.) Unreported, Vol. 11, Reporter's Transcript of Trial Proceedings, October 17, 1946, pp. 1115-18 (Judge Bowen).

Russellville Canning Co. v. *American Can Co.*, 87 F. Supp. 484 (D. C. W. D., Ark.) (Judge Miller).

Winkler-Koch Eng. Co. v. *Universal Oil Prod. Co.*, 96 F. Supp. 1014 (D. C. N. Y., 1950) (Judge Nevin).

Suckow Borax Mines Consol. v. *Borax Consolidated,* 185 F. 2d 196 (C. C. A. 9).

CONCLUSION.

Petitioners present no special and important reason for the issuance of the writ. They merely seek another review by an appellate court. They are forced into the position of asking this court to upset the fundamental law of damages; to upset the principle laid down in the Emich case; to grant a special dispensation regarding the finality of judgments. They assert (we have no knowledge of the facts) that they have about 150 cases pending against them "based in part on the conspiracy found in the Paramount case" (p. 14, Petition). If they are as guilty in those cases as in the case at bar, and we are to have a government of law, why should not the same result follow? Why does that afford any reason for this court to intervene? If they are not guilty, the courts in which those cases are pending may be relied upon to see that a just and right result is reached.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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